2009

Contextualizing Criminal Defences: Exploring the Contribution of Justice Bertha Wilson

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Citation Details

Isabel Grant & Debra Parkes, "Contextualizing Criminal Defences: Exploring the Contribution of Justice Bertha Wilson" in Kim Brooks ed, *Justice Bertha Wilson: One Woman's Difference* (Vancouver: UBC Press, 2009) 153.

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Contextualizing Criminal Defences: Exploring the Contribution of Justice Bertha Wilson

Isabel Grant and Debra Parkes

In her influential 1990 speech "Will Women Judges Really Make a Difference?"[1] Justice Bertha Wilson urged judges to make an earnest attempt to "enter into the skin of the litigant and make his or her experience part of your experience and only when you have done that, to judge."[2] Much has been written about the ways in which Justice Wilson made a difference in Canadian law, the legal profession, and the judiciary. In this piece, we examine her work in the area of criminal law defences, asking what her suggestion that judges "enter into the skin" of accused persons might mean for this area of the law. Specifically, we focus on three cases where she examines the conceptual basis of various defences that include an objective reasonableness test; we suggest that these decisions are significant because of the way in which equality informs her attention to the context of the accused's actions and the context of the particular defence at issue.

It can be argued that, in all areas including criminal law, judging involves choosing to consider some contextual or explanatory factors over others; therefore, the question becomes *what sort of* context is relevant rather than *whether* context is relevant.[3] Judges regularly state that they are taking a contextual approach to adjudication in a variety of areas from constitutional law[4] to administrative law[5] to tax law,[6] but it is often unclear what exactly is meant by "context" in a given area. Examination of some of Justice Wilson's opinions on the nature of criminal defences reveals that her contextual approach was informed by her developing conception of equality.

For Justice Wilson, acknowledging the role of context did not necessarily involve applying defences differently to different defendants. She expressly denounced an approach that would *personalize* defences to account for individual characteristics of accused persons, arguing that such personalization undermined equality.[7] We examine whether the distinction between contextualization and personalization is supportable and consider some of the implications and complications inherent in assessing the actions of accused persons *in context*.

In the years since Justice Wilson's retirement, the Supreme Court has more firmly entrenched the doctrine of "moral involuntariness" (sometimes called "normative involuntariness"), which was first developed in *R. v. Perka*[8] as the conceptual basis for several criminal defences.[9] We suggest that this concept, combined with a trend toward personalizing objective tests for these defences, has led, in some cases, to a masking of the normative judgments at stake in criminal law[10] and a departure from the kind of contextual, equality-promoting analysis that Justice Wilson championed in cases such as *R. v. Lavallee*.[11]

In the following section, we survey the opinions penned by Justice Wilson in three important criminal defence cases: *R. v. Perka, R. v. Hill,* and *R. v. Lavallee*. These cases reveal the development in her understanding of equality in criminal law from a formal individualistic understanding of equality in *Perka* through to a nuanced substantive approach to equality in *Lavallee*. Next, we discuss two different ways that context figures in those opinions, first, to understand the accused's actions, and second, to locate the defence itself in its social and historical context to reveal biases and inequalities reflected therein. We then move to examine the Supreme Court's more recent approach to defences, highlighting the ways in which Justice Wilson's equality-informed contextual approach has been both present and absent in some of the Court's recent decisions.

The Role of Context in Defences: Normative Involuntariness and *R. v. Perka*

One of the earliest expressions of Justice Wilson's view on defences can be seen in *Perka*,[12] a case dealing with the defence of necessity. In *Perka,* the accused were smuggling cannabis from Colombia to Alaska. The ship in which they were travelling developed mechanical problems off the coast of Vancouver Island requiring them to land for their own safety. The crew had been ordered to offload the cannabis so that the ship would not capsize. The accused were charged with importing cannabis into Canada for the purposes of trafficking. The primary defence was necessity, a common law defence. Justice Dickson wrote the majority judgment in which he conceptualized necessity as an excuse. Justice Wilson wrote separate concurring reasons questioning the exclusive focus on an excuse analysis and leaving open the option of conceptualizing necessity as a justification. An excuse-based defence is one that recognizes the wrongfulness of the accused's actions but holds that those actions should not be punished, because of some characteristic or circumstance specific to the accused. By contrast, conceptualizing a defence as a justification indicates that, in the circumstances, the conduct was not wrongful. To put it another way, justifications look at the blameworthiness of the act, whereas excuses focus on the circumstances

of the actor.[13] Self-defence has been characterized as a justification, whereas duress generally has been considered an excuse.[14] The majority judgment in *Perka* introduced the concept of normative involuntariness, derived from the work of American scholar George Fletcher, as the foundation of the defence.[15] Although the conduct in question is not literally involuntary, the accused is seen as having had no real choice in the circumstances but to break the law. Exculpation is based on a concession to human frailty where the accused could not have been expected to act otherwise in an emergency situation.

Justice Wilson's judgment in *Perka* demonstrates her early views on the way that equality informs and shapes defences. She disagreed with the majority view that the necessity defence was based on a concession to human frailty. Rather, she would have left open the option of basing necessity on a theory of justification[16] whereby an actor's behaviour would be justified if he or she had two conflicting legal duties and chose the one that caused the least harm. In Justice Wilson's view, compassion for the actor must be considered in sentencing but not at the stage of assessing liability, because to do so would undermine principles of equality.[17] Culpability must be based on a normative assessment of the act, not on compassion for the actor. Relying on the famous *R. v. Dudley and Stephens* necessity case,[18] she posited equality as an underlying principle of criminal liability and exculpation: "The underlying principle here is the universality of rights, that all individuals whose actions are subjected to legal evaluation must be considered equal in standing. Indeed, it may be said that this concept of equal assessment of every actor, regardless of his particular motives or the particular pressures operating upon his will, is so fundamental to the criminal law as rarely to receive explicit articulation."[19] In questioning the concession to human frailty analysis, she rejected compassion as the basis for defences: "Where ... a defence by way of excuse is premised on compassion for the accused or on a perceived failure to achieve a desired instrumental end of punishment, the judicial response must be to fashion an appropriate sentence but to reject the defence as such. The only conceptual premise on which necessity as an excuse could rest is the inherent impossibility of a court's responding in any way to an act which, although wrongful, was the one act which any rational person would commit."[20] Justice Wilson's concerns about using human frailty as the basis for defences are clear in *Perka,* but her analysis of equality is undeveloped and, at times, resembles a formal equality approach, focusing on sameness and identical treatment for accused persons.[21] As demonstrated in *Lavallee,* discussed later in this chapter, Justice Wilson later utilized a substantive equality analysis, which goes beyond sameness and difference to acknowledge and address existing inequalities including, for example, the law's failure to respond adequately to the situation of women who have

experienced violence and abuse.[22] Arguably, though the facts in *Perka* did not raise substantive equality concerns in the same way as did *Lavallee,* there may be room in future cases to consider what a substantive equality approach might mean for the defence of necessity, particularly in light of concerns that the defence has failed to address class-based inequality.[23]

A Limited Recognition of Context: *R. v. Hill*

Justice Wilson returned to the role of equality in conceptualizing and applying defences in her dissenting opinion in *Hill,*[24] where the issue was the scope of the "ordinary person" or "objective" component of the provocation defence. Provocation, if successful, reduces what would otherwise have been murder to manslaughter on the basis that the accused, provoked by an act or insult of the victim, lost self-control and acted in a sudden, violent manner. The trier of fact must find that an ordinary person would also have lost self-control in the face of the insult. Historically, the characteristics and circumstances of the accused were not attributed to the ordinary person. In *Bedder v. DPP,* for example, the English Court of Appeal held that insults regarding a man's impotence had to be assessed from the standard of an ordinary person who was not impotent.[25] In *R. v. Parnerkar,* the accused's race was not considered relevant to the ordinary person test, even though the provocative insult was a racial one.[26] It could be argued that this very narrow approach to objective tests is falsely premised on a formal equality analysis with the implication that, to achieve equality, the law must treat everyone in the same way: devoid of any unique characteristics and regardless of their circumstances.

Gradually, courts began to look at the circumstances in which the accused found him- or herself in order to understand whether an ordinary person would lose self-control under a particular provocation. Thus, in *R. v. Daniels,* the Northwest Territories Court of Appeal recognized that a history of infidelity and violence was relevant to the final-straw provocative insult when the accused was taunted by her husband's lover.[27] In *Hill,* the Supreme Court accepted the relevance of surrounding circumstances from *Daniels,* going one step further to acknowledge that personal characteristics of the accused may also be considered in applying the objective test, with Justice Wilson's minority opinion being most explicit about the role of this contextual evidence in the jury's task.

Hill involved a fifteen-year-old boy who was accused of killing an older man, allegedly in response to a sexual advance. The victim was the accused's volunteer "Big Brother," and the two had apparently been drinking on the night in question. The issue was whether the jury should be told that the objective inquiry should be undertaken from the position of an ordinary person of the same age and gender as the accused. The majority judgment of Chief Justice Dickson held that gender and age could be considered by a trier of the fact but that the trial judge did not necessarily have to instruct the jury as such. In his view, jury members could use their common sense to determine which factors were relevant to the analysis. Hill's appeal from conviction was thus denied. Justice Wilson wrote one of three dissenting judgments. She held that both age and gender were relevant to the ordinary person analysis. Again, starting with the principles of equality and individual responsibility, she outlined the purpose of the objective test, keeping in mind that the provocation defence was based on a loss of self-control: "The objective standard, therefore, may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accuseds are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard."[28] Given this introduction, one might have expected that Justice Wilson would take a narrow approach to the defence, rejecting the relevance of the accused's characteristics in the name of equality. To the contrary, she based her analysis on a consideration of context that, unlike a personalized objective test, does not depart from the basic premise of equality under the law. In her view, one must understand the context of the provocative insult, not to demonstrate compassion toward the accused, but rather because it sheds light on the nature of the insult and ultimately informs the normative assessment of the reasonableness of the accused's response.[29]

Justice Wilson distinguished between two different ways of using context to satisfy the objective test. First, evidence about the circumstances and characteristics of the accused can put the insult in context. For example, in light of the reality of racism in contemporary society, a racial taunt is likely to provoke an accused of the race in question.[30] Considering the race and gender of the accused does not undermine principles of equality if those factors shed light on the nature of the provocative insult in question. Thus, human frailties may be relevant to the provocation analysis, not because of sympathy or compassion for the accused, or as a recognition of weakness, but rather because they shed light on the ordinariness of the accused's response.

The second use of such evidence would be to argue that the standard of self-control we expect from people with certain characteristics or from certain social groups is lowered. Justice Wilson argued that allowing such characteristics to alter the standard of self-control expected of the accused would almost always undermine the overarching principle of equality. She made an exception, however, for young persons. Acknowledging a lower standard of self-control for young people is consistent with equality and society's recognition that young people are "in the developmental stages *en route* to full functioning capacity as adults."[31]

A Richer Understanding of Context: *R. v. Lavallee*

Lavallee presents the quintessential example of Justice Wilson taking context into account where the law had previously refused to do so.[32] In *Lavallee,* the Court examined a self-defence claim by a woman who had been in a relationship involving repeated abuse. Self-defence, as codified in ss. 34 and 35 of the *Criminal Code,* justifies the use of force, including deadly force, where an individual has been threatened with grievous bodily harm or death.[33] For deadly force to be justified, the accused must reasonably have perceived she was at risk of grievous bodily harm or death and that she could have preserved herself only by using deadly force.

The accused, Angelique Lyn Lavallee, had been repeatedly abused by her partner, the deceased, Kevin Rust. After an argument in an upstairs bedroom, Rust apparently handed Lavallee a gun and indicated that either she must kill him or he would kill her. He also told her she would "get hers later." As Rust was leaving the room, she shot him in the back of the head, killing him.

The difficulty with her self-defence claim was that, because Rust was leaving the room and was unarmed, it could not be argued that Lavallee was under an immediate or imminent threat of grievous bodily harm or death. Accordingly, she did not need to shoot him to preserve herself – she could simply have left the home.

Justice Wilson's analysis focused on the evidence necessary to assist the jury to understand both why the accused felt her life was threatened and why she was unable to escape the violence. In *Lavallee,* Justice Wilson took the analysis further than she did in *Hill,* looking beyond the factual context of the case in question to critique the social context of self-defence by demonstrating the gendered nature of its development.

She noted that the historical and ongoing acceptance of violence against women has meant that it remains underreported and that the experiences of the women involved remain misunderstood. In her view, the jury must be equipped to understand the accused's conduct in its social context so that it could accurately assess the reasonableness of her actions. This context was particularly important because of the gendered way in which self-defence law had evolved and because of the (often false) assumptions made about women in abusive relationships. The jury in a self-defence case is asked to decide what a reasonable person would do if faced with these circumstances. In an oft-quoted passage, Justice Wilson observed the disadvantage imposed on women by the traditional doctrine of self-defence: "If it strains credulity to imagine what the 'ordinary man' would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man.'"[34]

The link between contextualization and equality is also clear in Justice Wilson's judgment in *Lavallee.* In order to give effect to women's equality, it is necessary to recognize that their circumstances and experiences, as well as their perceptions, may differ from those of men because of the ongoing reality of sex inequality and violence in intimate relationships. Justice Wilson quoted from an American decision in *State v. Wanrow*[35] to establish the connection between the development of self-defence law and sex inequality: "The respondent was entitled to have the jury consider her actions in the light of her own perceptions of the situation, including those perceptions which were the product of this nation's 'long and unfortunate history of sex discrimination.' Until such time as the effects of that history are eradicated, care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination."[36] This is not to suggest that all women who experience abuse respond in the same way or that all those who kill their abusive spouses are entitled to an acquittal. Justice Wilson acknowledged that women who have been battered may well kill their partners other than in self-defence. The focus is not on who the woman is, but on what she did and the reasonableness of her actions when viewed in that broad social context.[37] With respect to Lavallee herself, Justice Wilson concluded that there was sufficient evidence to demonstrate that the accused was acutely aware of when violence was likely to follow and that she was reasonable in believing that she could not extricate herself from it. Thus, the jury's decision to acquit was upheld.

We recognize that *Lavallee* can (and has) been interpreted as, in essence, utilizing contextual evidence in a manner consistent with a "concession to human frailties" approach to self-defence. In particular, expert evidence of "battered woman syndrome" (which is based on the assumption that "learned helplessness" results from persistent abuse) may be interpreted as focusing the inquiry on what standard of behaviour can be expected of a "helpless" battered woman. It is this interpretation that has been criticized as creating a new stereotype of the battered woman and for seeming to lower the standard expected of her, rather than focusing on the reasonableness of her actions in a context that may not be easily understood.[38] We argue that *Lavallee* should, instead, be seen as utilizing social context evidence to understand the reality faced by women who experience persistent abuse, an understanding that is necessary to applying a standard of reasonableness to their use of violence against an abusive partner. Part of that reality is the recognition that women are most in danger of lethal violence when they try to extricate themselves from a violent relationship[39] and that they may reasonably believe the police will not protect them.[40] In addition, women who have experienced persistent abuse may have a heightened awareness of impending violence and its severity.

We see a significant distinction between a contextual inquiry focused on discerning the reasonableness of an accused person's actions and a more personalized inquiry focused on the particular frailties of an accused, leading to a potentially lower standard of behaviour expected of a person with those experiences or characteristics.[41] *Lavallee* recognizes that the prevailing inequality in heterosexual relationships may shed light on the reasonableness of a woman's actions in ways jurors might not otherwise understand.

In light of allegations that Justice Wilson was a "judicial activist,"[42] it is significant to note that she grounded her analysis firmly in legal doctrine.[43] In *Lavallee,* for example, she did not depart from the statutory framework of self-defence but rather incorporated an equality-sensitive examination of social context into that framework. It is the s. 34(2) criteria that form the foundation of the self-defence claim.

Two Roles for Context: Contextualizing the Accused's Actions and the Defence Itself

Justice Wilson's view of the individual is essentially a liberal one that emphasizes "individual responsibility"[44] and autonomy.[45] However, the contextual approach she championed pays close attention to the relationships between individuals and their environment and community.[46] We argue that Justice Wilson's consideration of context in criminal defences focuses on two key inquiries, both of which are infused with conceptions of equality.

First, context helps decision makers understand the actions of accused persons in their circumstances, particularly where those circumstances may be outside the trier of fact's everyday understanding. As discussed earlier, this differs from "personalizing" a defence, which would essentially lower the standard expected of the accused. Rather, this approach sheds light on the reasonableness of the accused's actions.

Juries construct stories out of the evidence provided to them, cobbled together with their own life experiences. Justice Wilson's opinions in both *Hill* and *Lavallee* are about helping the jury to assemble the story that will most accurately and fairly evaluate the actions of the accused.[47] This is not to take pity on the accused but rather to help the jury, particularly where the context may differ from its own, to construct a narrative that actually incorporates the experience of the accused.[48]

Second, Justice Wilson extended the contextual inquiry to examine the social context of the defence itself, allowing the decision maker to assess the values promoted by the defence and the requisite normative judgments to be made about the accused's conduct. This sort of contextual inquiry, rooted in a commitment to gender equality in *Lavallee,* expanded the application of self-defence to take into account the experiences of women in abusive relationships and might be employed in a similar way to render

duress[49] and necessity[50] more inclusive and consistent with gender equality. Such an approach could, however, result in circumscribing other defences, such as provocation, that may perpetuate inequality.

This second use of context looks at the defence itself, its history and development, the values associated with its application, and how it relates to the case at issue. Recognizing context is never a value-neutral exercise. Justice Wilson's opinion in *Lavallee* was grounded in this recognition, meaning that an evaluation of the normative foundation and paradigmatic narrative of the defence itself was vital to her contextual inquiry. Essentially, Justice Wilson asked in *Lavallee,* "what would self-defence look like if it were inclusive of women's experiences of gendered violence?" The social context evidence of women in abusive relationships was directed at answering this question, as well as at assessing the reasonableness of Lavallee's actions within this newly contextualized framework.

Justice Wilson's analysis in *Lavallee* was more attuned to social context than was her judgment in *Hill.* The defence of provocation cries out for an analysis that locates it within its historical context. Provocation is rooted in a long history of excusing male violence against women[51] and, more recently, excusing homophobic violence against gay men.[52] The inquiry of whether an "ordinary person" would lose self-control in the face of a particular insult carries the potential to excuse male violence against women or against gay men, particularly if gender inequality and homophobia are sufficiently "ordinary" in Canadian society.[53] In *Hill,* gender was effectively used as a proxy for sexual orientation, with the underlying assumption being that a same-sex sexual advance is more likely than a heterosexual advance to deprive the ordinary (presumptively heterosexual) man of self-control to the point of lethal violence.[54]

The above analysis of the three judgments of Justice Wilson demonstrates that her understanding and use of context evolved through her early decision in *Perka,* culminating in *Lavallee* where she explicitly used context in the second way referred to here, to develop the doctrine of self-defence to promote gender equality. Noting the extent to which the norm of equality informed these opinions demonstrates that a contextual methodology can avoid the critics' charge of being an unprincipled purely result-oriented inquiry into a range of background facts.

Defences in the Supreme Court of Canada after Justice Wilson

Since Justice Wilson's retirement, the Supreme Court has developed its jurisprudence of criminal defences in two significant ways. First, the Court has entrenched the personalized objective test for all "affirmative defences" such as duress, necessity, self-defence, and provocation.[55] Second, the Court has adopted moral voluntariness as a principle of fundamental justice under s. 7 of the *Charter,* meaning that morally involuntary conduct cannot be

criminally punished.[56] Both of these doctrinal developments came in cases involving duress, a defence that was not the subject of a Wilson opinion at the Supreme Court, but that is closely related to necessity and self-defence and can be informed by her analysis relating to these other defences. We consider each of these developments in turn and use the Court's approach to personalizing the objective test for provocation in *R. v. Thibert* to demonstrate the difference between personalization and a full contextual inquiry, as well as the potential dangers of an open so-called contextual inquiry.[57]

Personalizing the Objective Test: *R. v. Hibbert* and *R. v. Latimer*

Throughout the mid- to late-1990s, the Supreme Court adopted an approach to adjudicating criminal defences that incorporated the personal characteristics and experiences of the accused into the objective test. *R. v. Hibbert*[58] was a landmark decision because it settled that "a personalized objective test" was appropriate for defences, although the Court had earlier rejected such an approach for objective tests in the definition of offences such as those involving criminal negligence.[59] The Supreme Court held in *Hibbert* that, in applying the objective elements of duress, the accused's "perceptions of the surrounding facts can be highly relevant to the determination of whether [his or her] conduct was reasonable under the circumstances, and thus whether his or her conduct is properly excusable."[60]

Lawrence Hibbert was charged with the attempted murder of his friend Fitzroy Cohen, on the basis that he was a party to the offence. Hibbert called the victim down to the lobby of his apartment building, allegedly under threats from a co-accused who ultimately shot Cohen. The jury convicted Hibbert of the included offence of aggravated assault. The Supreme Court ordered a new trial for Hibbert, in part because the trial judge erred in not instructing the jury that the existence of a "safe avenue of escape" from the threats was to be determined on a personalized objective basis, to include consideration of the accused's ability to perceive an alternative course of action.

In his analysis for the Court, Chief Justice Lamer stated that each of the three defences of duress, necessity, and self-defence employs a personalized objective test that "takes into account the ... human frailties of the accused."[61] At various points throughout the decision, he lumped the three defences together under the rubric of excuse-based defences,[62] even though self-defence is conventionally characterized as a justification.[63] He also relied on the concept of normative involuntariness as the theoretical basis for at least the defences of necessity and duress.[64] He explained that it was important to take the particular frailties of an accused into account, stating that "a person does not 'choose' inaction when he or she is *incapable* in the first place of acting, or of knowing when to act."[65] The focus was on the degree to which the accused could be expected to make a rational judgment, given his or her experiences or characteristics, an approach that may amount to lowering the standard of behaviour expected of some accused persons. In this way, personalizing an objective test is different from the contextualization we see in *Lavallee*.

Most recently, the Supreme Court has personalized elements of the objective test for the defence of necessity. In *R. v. Latimer*, the only Supreme Court decision to consider that defence since *Perka*, the Court held unanimously that there was no air of reality to Robert Latimer's claim that he was acting out of necessity when he killed his daughter, Tracy, who had a severe form of cerebral palsy.[66] In analyzing the necessity claim, the Court held that the first two elements of the defence – namely, whether the accused was in a situation of imminent peril and whether there was no reasonable legal alternative to breaking the law – were assessed by using a personalized objective test. The Court confirmed that the proportionality element (*i.e.*, weighing the harm caused by the accused's conduct against the harm avoided) was not personalized. It remained a true objective assessment "since evaluating the gravity of the act is a matter of community standards infused with constitutional considerations (such as, in this case, the section 15(1) equality rights of the disabled)."[67] Nevertheless, for the first two elements, the Court relied on *Hibbert* for the proposition that "it is appropriate, in evaluating the accused's conduct, to take into account personal characteristics that legitimately affect what may be expected of that person."[68]

Given Justice Wilson's rejection of an exclusive excuse-based analysis for necessity, together with her concern about personalizing objective tests to effectively lower the standard expected of the accused rather than to assess the reasonableness of his or her actions, we suggest that she may have had reservations about the conceptual approach taken to necessity in *Latimer*, while agreeing with the proportionality analysis and the result. If one looks beyond *Latimer*, it is clear that necessity is closely circumscribed in Anglo-Canadian law. It has been limited to situations of "imminent peril" that the courts have confined to unusual emergencies, rather than persistent social emergencies such as homelessness.[69] Personalizing the objective test to account for individual human frailties, particularly when necessity is conceptualized as excusing normatively involuntary behaviour, does not address the broader context and critiques of the defence.

The Perils of Context Unlimited: *R. v. Thibert*

The Court's decision in *Thibert*, involving the provocation defence, demonstrates some potential dangers of an open so-called contextual inquiry where the objective test is personalized to effectively lower the standard of conduct expected of the accused, without attending to social inequalities underlying the defence.[70] In a narrow three-to-two decision, the Court developed an analysis of provocation resting on a recognition of human frailty. Thibert,

the accused, was charged with murdering his estranged wife's lover. Carrying a sawed-off shotgun in his car, he went to meet his wife at her workplace to plead with her to return to the marriage. He admitted that he had planned to use the gun to kill the deceased but claimed that he changed his mind before arriving at his wife's workplace. He met her outside the workplace, and the victim soon joined them. Thibert confronted the pair with the loaded gun. In the alleged provocative act, the deceased stood behind the accused's wife, moving her body back and forth like a shield and saying, "[C]ome on big fellow, shoot me. You want to shoot me? Go ahead and shoot me."[71]

In holding that there was an air of reality to the defence of provocation, Justice Cory began by linking the objective test to the recognition of human frailties: "I think the objective element should be taken as an attempt to weigh in the balance those very human frailties which sometimes lead people to act irrationally and impulsively against the need to protect society by discouraging acts of homicidal violence."[72] Conceptually, an understanding of human frailties may justify the subjective branch of the provocation defence (*i.e.*, the requirement that the accused was, in fact, provoked), but such an approach has never been used as the basis for determining whether an ordinary person would have been so provoked. To the contrary, in *Hill*, for example, Chief Justice Dickson stated that the objective test was intended to set a minimum standard of behaviour for all persons: "It is society's concern that reasonable and non-violent behaviour be encouraged that prompts the law to endorse the objective standard. The criminal law is concerned, among other things with fixing standards for human behaviour. We seek to encourage conduct that complies with certain societal standards of reasonableness and responsibility."[73]

The majority in *Thibert* took what we can only describe as a generous approach to the ordinary person component of the provocation defence. Relying on *Hill* and *Daniels*, the majority considered the following evidence as "context": that Thibert's wife had planned to leave him on a previous occasion, but he had convinced her to return; that Thibert was distraught and had not slept for thirty-four hours; that he wanted very badly to speak to his wife in private; and that the deceased held Ms. Thibert "by her shoulders in a proprietary and possessive manner and moved her back and forth in front of him while he taunted the accused to shoot him."[74] This, in the view of the majority, was sufficient to put the defence to the jury. It was suggested that, under such circumstances, an ordinary married man faced with the breakup of his marriage might well have lost his self-control in the face of such provocation.[75]

In a stinging dissent, Justice Major found no evidence to support putting the defence to the jury. The uncontradicted evidence was that Thibert confronted the deceased with a loaded weapon and remained in control of that weapon throughout the encounter. It was inappropriate for the law to tell victims how they were expected to respond when faced with such a threat. The accused had no right to demand a private meeting with his wife: "At law, no one has either an emotional or proprietary right or interest in a spouse that would justify the loss of self-control that the appellant exhibited."[76]

How can our understanding of Justice Wilson's approach to context help to explain what went wrong in *Thibert*? Both the majority and the dissent attempted to contextualize the objective test. Both brought in relevant factors that put the insult in context, although the two judgments presented very different views of the factual context. Such an approach is consistent with the first kind of contextualization found in Justice Wilson's opinions – rendering the accused's act intelligible to the trier of fact. Yet the emphasis on Thibert's "very human frailties which sometimes lead people to act irrationally and impulsively" is more focused on lowering the level of conduct expected of a man who is unable to accept that a partner has left the relationship. What is missing from the majority judgment is any attempt to engage in the second kind of contextualization – that is, contextualizing the defence itself. *Thibert* is a clear example of why these two types of contextual inquiry are not conceptually distinct. To contextualize the facts in a case, one must be aware of the social context of the defence at issue. This is why *Lavallee* was groundbreaking. Lavallee's experiences were interpreted through the lens of the gender inequality that had informed self-defence law.

Provocation has a long history of gender inequality, whereby men have successfully used the defence after killing a female partner who had been unfaithful or who was trying to leave the relationship.[77] The majority judgment in *Thibert* portrayed male violence in heterosexual relationships as an excusing factor, perpetuating the notion of women as the property of their husbands. Rather than questioning the paradigmatic account of the defence (as Justice Wilson did in *Lavallee*), the majority in *Thibert* used "context" in a way that entrenched the paradigmatic defence, including the arguably discriminatory assumptions embedded within it.

The approach taken by the dissent, by contrast, was consistent with Justice Wilson's consideration of the social context of violence against women. It was also consistent with her concern in *Hill* that the objective test for provocation not be simply watered down to empty it of any normative judgment about acceptable conduct and self-control. Whereas defences such as necessity and duress acknowledge fear and the desire to protect oneself or loved ones, provocation privileges rage and a lack of self-control as mitigating factors. As such, it is ripe for the kind of equality-informed evaluation made of self-defence in *Lavallee*.[78]

Constitutionalizing Moral Involuntariness: *R. v. Ruzic*

The second important development in defences relates to constitutionalization of the principle of moral voluntariness as a prerequisite for criminal fault. In the 2001 decision in *R. v. Ruzic,* the Supreme Court of Canada elevated the concept of moral involuntariness to a principle of fundamental justice under s. 7 of the *Charter.*[79] Marijana Ruzic, a resident of Belgrade in the former Yugoslavia, was charged with importing narcotics into Canada and possessing a false passport. She claimed that she had smuggled the drugs because she had been told that her family would be seriously harmed if she did not comply. She raised the statutory defence of duress and successfully argued that the elements of the defence requiring immediacy of the threats and presence of the threatener violated s. 7. Justice LeBel, for a unanimous Court, held that Ruzic was entitled to rely on the more generous common law defence of duress, which had no immediacy or presence requirements, on the basis that she was acting in a morally involuntary manner.

The Court entrenched normative involuntariness as a principle of fundamental justice protected by s. 7 of the *Charter* such that only morally voluntary acts can be punished by the criminal law, a principle that would seem to apply beyond excuse-based defences such as duress.[80] Justice LeBel held that a "person acts in a morally involuntary fashion when, faced with perilous circumstances, she is deprived of a realistic choice whether to break the law."[81] Much like a physically involuntary act, the accused's act under duress could not meaningfully be attributed to her because her "conduct is not, in a realistic way, freely chosen."[82]

It has been argued that this focus on voluntariness is based on a mechanistic account of human agency and thereby "acts as a normative veil, hiding the underlying assumptions about what emotions are legitimate or illegitimate, [and] what actions are good or bad."[83] Furthermore, the formulation of normative involuntariness in *Ruzic* is extremely broad, suggesting that conduct that is normatively involuntary can never be punished. This conceptual basis for defences is potentially broader than the concept of moral innocence that the Court rejected in *Ruzic*[84] on the basis that it was "undefinable and potentially far-reaching" in nature.[85]

What do the judgments of Justice Wilson tell us about the adoption of normative involuntariness as the conceptual basis for defences? At the very least, she focuses the application of the objective test on equality and on the notion that accused persons are rational actors making choices in what are often very difficult circumstances. Although those circumstances must be evaluated in light of the historical development and biases inherent in the defence in question, denying the accused's agency in deciding how to respond is not adequate. Given Justice Wilson's analysis in *Lavallee,* it is likely that she would have reached a result similar to that of the Court in *Ruzic,* abolishing the immediacy and the presence requirements of the duress defence of s. 17 of the *Criminal Code.* However, we know from *Perka* that Justice Wilson was concerned about basing defences on a concession to human frailty, a concept that is at the heart of normative involuntariness. Rather, we believe she would have focused on the rational decision made by the accused and would perhaps have asked whether Ruzic avoided a greater harm by committing the offence.

When *Lavallee* is read together with *Perka* and *Hill,* we discern an approach to criminal defences that is, on the whole, at odds with the mechanistic account of human behaviour[86] (*i.e.,* the accused had no real choice) inherent in the normative involuntariness concept. Justice Wilson did not shy away from the idea that accused persons were responsible for their actions, but she did not accept that the normative assumptions about acceptable human motivations built into our existing criminal defences are always just. In some cases, those assumptions are inaccurate or inconsistent with fundamental values such as equality.

Concluding Thoughts on Context and Criminal Defences

Contextualism, which has been called the "Supreme Court's new standard of judicial analysis and accountability,"[87] has come to pervade judicial decision making, at least to the extent that judges regularly appeal to context. Richard Devlin and Matthew Sherrard suggest that taking a contextual approach means that judges should "tailor their responsibilities to the realities of *systemic and intersectional inequality* in Canadian society."[88] The work of Justice Wilson in cases such as *Lavallee* has begun this process for criminal defences, but, as cases such as *Thibert* reveal, much work remains to be done. We hope that the Court's increased reliance on the concept of normative involuntariness will not impede its consideration of both forms of context discussed in this chapter, which, we believe, provide some principles to guide the ongoing development of the doctrine of criminal defences in an equality-promoting manner.

We do not mean to suggest that Justice Wilson's decisions provide a blueprint for substantive equality in the criminal law, which is a massive and perhaps impossible task in the context of our existing criminal justice system.[89] It would be inappropriate to read too much of our own critiques of substantive criminal law doctrine into her decisions, particularly given her apparent commitment to a cautious, incremental approach to developing the law. Nevertheless, her contributions in this area are worth considering, along with those of other recent members of the Court.[90]

As Rosemary Cairns Way has argued, the strict doctrinal dichotomy between subjective and objective fault, and particularly the early *Charter* trend toward constitutionalizing certain fault requirements, "masks the normative complexity of the allocation of blame."[91] The flip side of allocating blame is determining the scope of exculpation through the application of criminal

defences, a task that involves equally complex normative judgments.[92] We see in Justice Wilson's contextual approach a willingness to wrestle with difficult normative issues in criminal law, at least to the extent of encouraging us to question the conceptual foundations of certain defences and the way that some defences may entrench existing inequalities. It will be up to the present Court to determine the extent to which this approach will influence future development of criminal law defences.

Acknowledgments

The authors thank Grant Hughes for his research assistance and the Manitoba Legal Research Institute for its support of this project. Thank you also to Benjamin Berger, Kim Brooks, Melina Buckley, and Jennifer O'Leary, who read drafts of this chapter and provided helpful feedback.

Notes

1 Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28 Osgoode Hall L.J. 507.
2 *Ibid.* at 521.
3 In *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 [*R.D.S.*], the opinion of Justices McLachlin and L'Heureux-Dubé quotes Justice Cardozo on the impossibility of true judicial neutrality: "All their lives, forces which [judges] do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs ... We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own." B.N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) quoted in *R.D.S.* at para. 34.
4 See *e.g. Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at paras. 62-75 (on equality rights). The malleability of the "contextual approach" established in *Law* has been the subject of much critical commentary. See *e.g.* Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can. Bar Rev. 299.
5 Lorne Sossin and Colleen M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007) 57 U.T.L.J. 581; Robert Leckey, *Contextual Subjects: Family, State, and Relational Theory* (Toronto: University of Toronto Press, 2008) at 175-208.
6 J.E. (Ted) Fulcher, "Using a Contextual Methodology to Accommodate Equality Protections along with the Other Objectives of Government (with Particular Reference to the *Income Tax Act*): 'Not the Right Answer, Stupid. The Best Answer'" (1996) 34 Alta. L. Rev. 416.
7 Justice Wilson rejected a personalized objective test in contexts other than defences. In *R. v. Tutton*, [1989] 1 S.C.R. 1392, for example, a case in which parents were charged with manslaughter for failing to provide insulin to their diabetic child because they believed he had been healed by God, the issue was whether the *mens rea* for criminal negligence should be assessed on an objective or subjective standard. The Court split three to three, with Justice Wilson writing reasons in favour of subjective fault. She rejected the attempt by Justice Lamer to incorporate the personal characteristics of the accused into an objective standard of liability.
8 *R. v. Perka*, [1984] 2 S.C.R. 232 [*Perka*].
9 *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687 [*Ruzic*]. (Although *Ruzic* was a duress case, the case law indicates that the principle of moral or normative involuntariness applies to other defences as well.)
10 Benjamin L. Berger, "Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defences" (2006) 51 McGill L.J. 99.
11 *R. v. Lavallee*, [1990] 1 S.C.R. 852 [*Lavallee*].
12 *Perka, supra* note 8.

13 For a critique of the distinction between justifications and excuses, see Berger, *supra* note 10 at 104. Berger argues that all affirmative defences, whether conceptualized as excuses or justifications, have as their core a set of normative evaluations about the appropriate way to act.
14 See s. 34 of the *Criminal Code*, R.S.C. 1985, c. C-46 (self-defence); *R. v. Hibbert*, [1995] 2 S.C.R. 973 [*Hibbert*] (duress).
15 George Fletcher, *Rethinking Criminal Law* (Boston: Little Brown, 1978).
16 Necessity is conceptualized as a justification in, for example, the French and German legal systems, as well as in the American Law Institute's Model Penal Code. See Benjamin L. Berger, "A Choice among Values: Theoretical and Historical Perspectives on the Defence of Necessity" (2002) 39 Alta. L. Rev. 848 at paras. 28-35.
17 Wilson's consideration of equality in this case (and in others such as *R. v. Hill*, [1986] 1 S.C.R. 313 [*Hill*], where she pairs the notion with "individual responsibility") indicates a liberal formal equality approach that favours treating accused persons in the same manner. However, her later use of context in *Lavallee, supra* note 11, with its emphasis on the ongoing reality of violence against women and the failure of the law to respond to that reality, seems grounded in a vision of substantive equality.
18 Dudley and Stephens were sailors who were charged with the murder of a young member of their crew on the high seas and who claimed that they killed only under conditions of necessity – a shipwreck and near-certain starvation. The House of Lords rejected their claim of necessity and set very narrow parameters on the defence. *R. v. Dudley and Stephens* (1884), 14 Q.B.D. 273.
19 *Perka, supra* note 8 at para. 91.
20 *Ibid.* at para. 105.
21 Christine Boyle, "The Role of Equality in Criminal Law" (1994) 58 Sask. L. Rev. 203 at 213.
22 *Lavallee, supra* note 11.
23 See *R. v. Creighton*, [1993] 3 S.C.R. 3 [*Creighton*] (concerning unsuccessful claims of necessity arising out of poverty and homelessness).
24 *Hill, supra* note 17.
25 *Bedder v. DPP* (1954), 2 All E.R. 801 (C.A.).
26 The accused, a South Asian man, had stabbed to death the woman whom he intended to marry. Her son testified that she had told the accused "I am not going to marry you because you are a black man," just before he stabbed her. *R. v. Parnerkar*, [1974] S.C.R. 449 at 457.
27 *R. v. Daniels* (1983), 7 C.C.C. (3d) 542 (N.W.T. C.A.).
28 *Hill, supra* note 17 at para. 68.
29 *Ibid.* at para. 72.
30 See generally Camille Nelson, "(En)Raged or (En)Gaged: The Implications of Racial Context to the Canadian Provocation Defence" (2002) 35 U. Rich. L. Rev. 1007. While on the Ontario Court of Appeal, Wilson J. was the lone dissenter in favour of allowing provocation to go to the jury in a case where evidence indicated that the black accused had been called a "two-bit nigger punk" by the deceased. See *R. v. Olbey* (1977), 38 C.C.C. (2d) 390.
31 *Hill, supra* note 17 at 350.
32 *Lavallee, supra* note 11.
33 *Criminal Code*, R.S. 1985, c. C-46.
34 *Lavallee, supra* note 11 at 874.
35 *State v. Wanrow*, 559 P. (2d) 548 (Wash. Sup. Ct. 1977).
36 *Ibid.* at 559, quoted in *Lavallee, supra* note 11 at 875.
37 Christine Boyle has argued that "*Lavallee* may be the best-known example of an attempt to take an approach in which gender is not extracted out of the context." Christine Boyle, "The Role of the Judiciary in the Work of Madame Justice Wilson" (1992) 15 Dal. L.J. 241 at 246.
38 Isabel Grant, "The 'Syndromization' of Women's Experience" Part 4 in "A Forum on *Lavallee v. the Queen:* Women and Self-Defence" (1991) 25 U.B.C. L. Rev. 23 at 51-59.
39 Canadian Centre for Justice Statistics, "National Trends in Intimate Partner Homicides, 1974-2000" (2002) 22:5 Juristat 1 (reporting that women separated from their abusive partners were killed at the highest rate among spousal homicides).

40 Elizabeth A. Sheehy, "Causation, Common Sense, and the Common Law: Replacing Unexamined Assumptions with What We Know about Male Violence against Women or from *Jane Doe* to *Bonnie Mooney*" (2005) 17 C.J.W.L. 87.
41 We thank Benjamin Berger for his insightful comments on this aspect of our argument and for urging us to articulate more clearly our concern about conceiving of defences as concessions to *personal* human frailties.
42 Robert Hawkins and Robert Martin, "Democracy, Judging and Bertha Wilson" (1995) 41 McGill L.J. 1.
43 See also Wilson's judgment on intoxication in *R. v. Bernard,* [1988] 2 S.C.R. 833, which formed the basis of the Court's later decision in *R. v. Daviault,* [1994] 3 S.C.R. 63.
44 *Hill, supra* note 17.
45 In *R. v. Morgentaler,* [1988] 1 S.C.R. 30 at 166, Wilson J. was alone in viewing the criminal prohibition on abortion as a violation of women's liberty rights to "make fundamental personal decisions without interference from the state."
46 Danielle Pinard, "The Constituents of Democracy: The Individual in the Work of Madame Justice Wilson" (1992) 15 Dal. L.J. 81 at 91-92 (arguing that "one finds in Judge Wilson's work one preoccupation for the individual as a socially constructed being, and another for the welfare of the community as a whole").
47 See Marilyn MacCrimmon, "The Social Construction of Reality and the Rules of Evidence" in Donna Martinson *et al.*, "A Forum on *Lavallee v. R:* Women and Self-Defence" (1991) 25 U.B.C. L. Rev. 23 at 36-50.
48 See also Hester Lessard, "Equality and Access to Justice in the Work of Bertha Wilson *Symposium Proceedings*" (1992) 15 Dal. L.J. 35 at 60.
49 See Isabel Grant, "Exigent Circumstances: The Relevance of Repeated Abuse to the Defence of Duress" (1997) 2 Can. Crim. L. Rev. 331 (where the author examines the relevance of *Lavallee* in cases involving women who commit crimes under the duress of abusive male partners).
50 In one lower court decision, *R. v. Lalonde* (1995), 22 O.R. (3d) 275 (Gen. Div.), allowing a necessity defence to (welfare) fraud charges, the Court took into account the accused woman's experience of abuse at the hands of her former common law partner. Although the analysis is not well developed, the case has been described as significant for, among other reasons, recognizing the impact of battering as essential to contextualizing the "highly rigid doctrinal requirements of the defence of necessity." Sheila Noonan, "*Lalonde:* Evaluating the Relevance of BWS [battered woman syndrome] Evidence" (1995) 37 C.R. (4th) 110 at 111.
51 Andrée Coté, Diana Majury, and Elizabeth Sheehy, "Stop Excusing Violence against Women" (Position paper on the defence of provocation, National Association of Women and the Law, April 2000) [unpublished], online: <http://www.nawl.ca/ns/en/is-vaw.html#provocation>.
52 Bruce MacDougall, *Queer Judgments: Homosexuality, Expression, and the Courts in Canada* (Toronto: University of Toronto Press, 2000) at 154-65; N. Kathleen (Sam) Banks, "The 'Homosexual Panic' Defence in Canadian Criminal Law" (1997) 1 C.R. (5th) 371.
53 On the other hand, it has been argued that a provocation defence, infused with equality considerations, "may provide the sole vehicle ... for a contextual assessment of systemic racism when it plays a role in triggering violent responses." Nelson, *supra* note 30 at 1013-14.
54 MacDougall, *supra* note 52 at 154-65; Banks, *supra* note 52.
55 This approach was confirmed in *Hibbert, supra* note 14.
56 *Ruzic, supra* note 9.
57 *R. v. Thibert,* [1996] 1 S.C.R. 37 [*Thibert*].
58 *Hibbert, supra* note 14.
59 *Creighton, supra* note 23.
60 *Hibbert, supra* note 14 at para. 61.
61 *Ibid.* at para. 60.
62 At other times, he seemed to limit his comments to duress and necessity.
63 Chief Justice Lamer kept provocation analytically distinct from the other three defences, relying on Jeremy Horder for the distinction that provocation (partially) excuses a past insult, albeit one in the very recent past, whereas the other three defences are aimed at avoiding future harm. *Ibid.* at para. 49, citing Jeremy Horder, "Autonomy, Provocation and Duress" (1992) Crim. L. Rev. 706 at 709.
64 *Hibbert, supra* note 14 at paras. 57, 61-62.
65 *Ibid.* at para. 58 [emphasis in original].
66 *R. v. Latimer,* 2001 SCC 1, [2001] 1 S.C.R. 3.
67 *Ibid.* at para. 34.
68 *Ibid.* at para. 33.
69 Rejecting a claim of necessity to trespass by homeless squatters, Lord Denning stated that, "if hunger were once allowed to be an excuse for stealing, it would open a way through which all kinds of disorder and lawlessness would pass." See *Southwark London Borough Council v. Williams,* [1971] 2 All E.R. 175 at 179 (H.L.).
70 *Thibert, supra* note 57.
71 *Ibid.* at para. 26.
72 *Ibid.* at para. 4.
73 *Hill, supra* note 17 at para. 19. Justice Wilson took a similar view in *Hill,* describing the objective test as ensuring that "there is no fluctuating standard of self-control against which accused are measured." *Ibid.* at para. 68.
74 *Thibert, supra* note 57 at para. 23.
75 See also *R. v. Stone,* [1999] 2 S.C.R. 290 (where, in a case that was framed as a "nagging wife" situation, the Supreme Court did not question the appropriateness of putting provocation to the jury where the accused man killed his estranged wife by stabbing her forty-seven times). For critical commentary, see Coté, Majury, and Sheehy, *supra* note 51 at 7-9.
76 *Thibert, supra* note 57 at para. 65.
77 Coté, Majury, and Sheehy, *supra* note 51.
78 Justice Wilson's opinion in *Lavallee* expanded the scope of self-defence. However, in *R. v. Penno,* [1990] 2 S.C.R. 865, she wrote an opinion that limited the scope of the intoxication defence (making it unavailable for a charge of impaired driving), which indicated her willingness to impose limits on defences where the social context and need for equality and individual responsibility lead to such a conclusion.
79 *Ruzic, supra* note 9.
80 The Court's analysis of moral involuntariness extended beyond excuses to include all affirmative defences. See Berger, *supra* note 10; Don Stuart, *Charter Justice in Canadian Criminal Law,* 4th ed. (Toronto: Carswell, 2005) at 109. See also Stephen G. Coughlan, "Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change?" (2002) 7 Can. Crim. L. Rev. 147.
81 *Ruzic, supra* note 9 at para. 29.
82 *Ibid.* at para. 44.
83 Berger, *supra* note 10 at 110.
84 Coughlan, *supra* note 80.
85 *Ruzic, supra* note 9 at para. 41.
86 Berger, *supra* note 10 at 111.
87 Shalin M. Sugunasiri, "Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability" (1999) 22 Dal. L.J. 126 at 129-30.
88 Richard F. Devlin and Matthew Sherrard, "The Big Chill? Contextual Judgment after *R. v. Hamilton and Mason*" (2005) 28 Dal. L.J. 409 at 413-14 [emphasis in original].
89 For a discussion of the extent to which equality continues to be an "under-utilized and under-valued" principle in substantive criminal law decisions from the Supreme Court, see Rosemary Cairns Way, "Incorporating Equality in the Substantive Criminal Law: Inevitable or Impossible?" (2005) 4 J.L. & Equality 203 at para. 37. See also Boyle, *supra* note 21; Christine Boyle and John McInnes, "Judging Sexual Assault Law against a Standard of Equality" (1995) 29 U.B.C. L. Rev. 341.
90 See *e.g.* Rosemary Cairns Way, "Culpability and the Equality Value: The Legacy of the Martineau Dissent" (2003) 15 C.J.W.L. 53 (arguing that the approach taken by Justice Claire L'Heureux-Dubé to assessing culpability is multi-dimensional, contextualized, and equality promoting in its rejection of the doctrinal dichotomy between subjective and objective

fault). See also Janine Benedet and Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues" (2007) 52 McGill L.J. 515 at 548-51.

91 Cairns Way, *supra* note 90 at 55.

92 Berger, *supra* note 10.